No. 700

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

SANGAMON VALLEY TELEVISION CORPORATION, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR SIGNAL HILL TELECASTING CORPORATION IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia is reported at 324 F.2d 379, under the style *Fort Harrison Telecasting Corporation* v. *Federal Communications Commission*, and is also printed as part of the appendix to the Petition for a Writ of Certiorari (Pet. App. 1a-21a). The Report and Order of the Federal Communications Commission there affirmed (Docket No. 14267) is reported at 27 F.R. 7025 (July

25, 1962) and is also reported unofficially at 23 Pike & Fischer, Radio Regulation 1579.

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1963. A petition for rehearing en banc by Sangamon Valley Television Corporation was unanimously denied on September 25, 1963; a petition for rehearing en banc by the State of Illinois was unanimously denied on November 6, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission acted in conformity with Section 307(b) of the Communications Act in deleting VHF Channel 2 from Springfield, Illinois, and substituting two UHF channels therefor, in order to improve the opportunities for UHF service among a greater number of stations in the Springfield and central Illinois area, the Commission having found that to retain VHF Channel 2 in Springfield "would have a blighting effect on existing UHF stations and on UHF development in the near future."

STATUTE INVOLVED

Section 307(b) of the Communications Act provides as follows:

> "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same."

STATEMENT OF THE CASE

Petitioners challenge the validity of a "deintermixture" report and order of the Federal Communications Commission adopted on July 18, 1962, deleting VHF channel 2 from Springfield, Illinois and substituting therefor two additional UHF channels.

A similar report and order had been issued by the Commission on March 1, 1957. 15 Pike & Fischer Radio Regulation 1525. Sangamon Valley petitioned the United States Court of Appeals for the District of Columbia for review, claiming that this deintermixture of Springfield violated Section 307(b) of the Communications Act. On May 1, 1958, the Court of Appeals affirmed the March 1, 1957 action, the court finding "nothing arbitrary, capricious or otherwise illegal in the decision." *Sangamon Valley Television Corporation* v. *United States*, 103 U.S. App. D. C. 113, 255 F.2d 191

Sangamon Valley petitioned this Court for certiorari. On the basis of representations by the Solicitor General and Commission Counsel that various parties had apparently made ex parte presentations while the case was pending, this Court granted certiorari, vacated the judgment of the Court of Appeals, and remanded for further action. *Sangamon Valley Television Corporation* v. *United States*, 358 U. S. 49.

On remand from this Court, the Court of Appeals vacated the order of March 1, 1957, and remanded the case to the Federal Communications Commission for a determination as to the nature and source of all ex parte pleas. (*Sangamon Valley Television Corporation* v. *United States*, 106 U. S. App. D. C. 30, 269 F.2d 221.) The Commission thereupon designated Judge Horace Stern as special hearing examiner to consider the nature and effect of the ex parte presentations that had been made.

After a full hearing, Judge Stern issued an Initial Decision of March 11, 1960, holding that the March 1,

1957, order was voidable requiring further action. 19 Pike & Fischer Radio Regulation 1055. However, Judge Stern held that "no member of the Commission should be required to disqualify himself", *ibid*, at p. 1074, and that "the conduct of no party was such as to disqualify it", *ibid*, at p. 1074.

Referring specifically to the presentations made by an officer of Signal Hill Telecasting Corporation, Judge Stern found that they were made (*ibid*, at page 1073, Finding of Fact 22):

> "in the honest belief that there was nothing improper in so doing in a rule-making proceeding, *a view more or less generally held at the time by members of the industry, by other interested parties, by public officials, and apparently by lawyers as well.*" (emphasis supplied)

The Commission, by Report and Recommendation of February 16, 1961 (19 Pike and Fischer Radio Regulation 1055), adopted most of Judge Stern's initial decision, including his conclusion that no member of the Commission was disqualified to participate in the reopened proceedings and that the conduct of no party was such as to disqualify it. On reviewing this Report and Recommendation, the Court of Appeals held that it was "unnecessary for the Commission to reconsider the conclusion expressed in its Report and Recommendation of February 16, 1961, that no Commissioner was disqualified and no party is absolutely disqualified." The Court of Appeals merely directed that the Commission institute a *de novo* proceeding to determine the deintermixture question on the basis of a new evaluation, and that a "fresh start is necessary" noting "it would not be appropriate for the Commission to determine in 1961 on the basis of a somewhat supplemented 1957 record where and to whom VHF channel 2 ought to be assigned". (*Sangamon Valley Television Corporation* v. *United States*, 111 U. S. App. D. C. 113, 294 F.2d 742.)

On September 11, 1961, a *de novo* notice of proposed rule making was issued. By Report and Order released July 20, 1962, the Commission concluded that Channel 2 should be deleted from Springfield and two UHF channels substituted therefor. (J.A. 303-332, also reported at 23 Pike & Fischer Radio Regulation 1579.) In its decision, the Commission first reviewed the reasons it had given for its March 1, 1957, deintermixture order, which were (J.A. 309):

> "It (the Commission) found in its decision (of 1957) that the Springfield area was predominantly UHF, the terrain was ideally suited for UHF probogation, the vast majority of sets in the area were equipped to receive UHF signals, and a number of UHF stations were providing satisfactory service. The Commission also found that . . . retention of the VHF assignment at Springfield would seriously jeopardize the ability of UHF to compete effectively in the area or to survive . . ."

The Commission then stated that its objective was the same as in 1957 (J.A. 309, 310):

> "Our primary objective is the same as it was in 1957—to provide Springfield, the capital of the State of Illinois . . . with television assignments which offer the most realistic opportunities for the development of adequate television services to fill the needs and interests of the residents of the Springfield area. The question we must decide is whether all UHF assignments or VHF Channel 2 in combination with UHF assignments would best do so under present conditions . . ."

The Commission then found that "while no additional UHF outlets have yet been established in Springfield itself, competing applications have been tendered for Channel 26 in Springfield" (J.A. 311); that UHF station WICS at Springfield "improved its facilities in 1958" (J.A. 312) and "established Station WCHU, operating

on Channel 33 at Champaign" (J.A. 312); that "UHF stations WICS—WCHU—WICD, and WTVP, together with Station WCIA at Champaign, now each provide a listenable signal throughout the Springfield—Decatur—Champaign—Danville area" (J.A. 312); that "The ARB 1960 Study indicates that 100 percent of the television homes in Sangamon County are now equipped for UHF reception (the estimate was 90% in 1957)" (J.A. 312); and that "public acceptance of UHF in central Illinois has increased substantially." (J.A. 313)

After reciting these findings of fact (not challenged here) the Commission found (J.A. 319, 320):

> "We have concluded, after consideration of the comments that the public interest would be served by continuing Springfield as an all-UHF area. First, we point out that unlike the usual situation, any dislocation results here from failing to deintermix. Springfield is now, in fact, an all-UHF area insofar as local service is concerned; to use Channel 2 there would result in intermixing the local television service. It would also *introduce*, into the broader market area, a second VHF service, which would undoubtedly become a dominant station, as is the first VHF (WCIA). *It would have a blighting effect on existing UHF stations and on UHF development in the near future.*" (emphasis supplied in last sentence)

Only after reaching this conclusion, did the Commission then decide that "as a by-product of not using Channel 2 in Springfield" (J.A. 321) the channel "may continue to be used at St. Louis" and "may also be used to provide Terre Haute with a second local VHF service" (J.A. 321).

The Court of Appeals affirmed the foregoing decision of the Commission. *Fort Harrison Telecasting Corporation* v. *Federal Communications Commission, supra.* Pe-

titioners' motions for reconsideration en banc were denied by unanimous actions of the Court of Appeals.

ARGUMENT

1. Petitioners' Reason "(1)", for Allowance of the Writ, is that the reallocation of Channel 2 was taken [as asserted by Petitioners, p. 13] "for the purpose of enhancing the competitive positions of individual station operators". (Pet. p. 13) But, the question of competitive advantage or disadvantage to private parties begs the question. For, if Channel 2 were assigned to Springfield, it would be Sangamon Valley Television Corporation which, as a private party, would have such a competitive advantage and benefit over existing UHF operators as to drive them out of business.

The question, rather, is not what action will benefit what private parties but what action would give the public of Springfield and adjacent areas the greatest number of competitive television services.

In essence, petitioners argue that VHF and UHF television are so unrelated that Section 307(b) requires a separate distribution of VHF and UHF channels, thus prohibiting the Commission from deleting VHF Channel 2 out of Springfield even though this will assure multiple UHF service for the public. This argument confuses ends with means. It would make an equal allocation of each type of channel an end in itself, regardless of the impact of such allocation on the total number of services received by a community. This would defeat, not promote, the purposes of Section 307(b). That section does not speak of an equal and equitable distribution of *frequencies* but of *service*. And if, as the Commission found, deletion of VHF Channel 2 would preserve and expand the total number of competitive television services on UHF channels, rather than destroy them, the Commis-

sion would clearly be warranted in requiring such deletion.

2. Petitioners' Reason "(2)", for Allowance the Writ, is that the Court and Commission actions deal "only in terms of the communities and totally disregard even the existence of the states involved." But, this clearly was not the case. The Commission explained (as already quoted above at p. 5) that (J.A. 309, et seq.):

> "our primary objective is the same as it was in 1957 —*to provide Springfield, the capital of the State of Illinois*, with a 1960 population of 83,271 and a population of 146,539 in its home county (Sangamon), with television assignments which offer the most realistic opportunities for the development of adequate television services to fill the needs and interests of the residents of the Springfield area. The question we must decide is whether all UHF assignments or VHF Channel 2 in combination with UHF assignments would best do so under present conditions, for it does not appear that other VHF channels may be assigned to Springfield under existing rules." (emphasis supplied)

Clearly the Commission, in the above italicized words, explicitly recognized that it was dealing with the fair and equitable allocation of television service not merely to Springfield considered as a local community but to "*Springfield, the capital of the State of Illinois.*" And, obviously, in considering Springfield as "the capital of the State of Illinois", the Commission's responsibility would not be met by a single theoretically feasible VHF assignment, if that would destroy multiple UHF service in the area. For, to blight multiple UHF service in Springfield considered as "the capital of the State of Illinois" would be no more in the public interest of the State of Illinois than of the local community of Springfield. In short, the Commission, far from "ignoring the need of the State of Illinois for a wide coverage television

facility in its capital" (Pet. p. 18) explicitly rejected such a facility because of its blighting effects on multiple UHF facilities in that very area.

As the Court of Appeals said (*Fort Harrison Telecasting Corp.* v. *Federal Communications Commission*, *supra*, at 384; Pet. App. 10a):

> "While we entirely sympathize with the desire of the State of Illinois and Sangamon for a VHF channel at Springfield, *it is not within our competency or function to say that Springfield's need could be met only by a single VHF channel rather than by two additional UHF channels, in the light of all the circumstances shown.*" (emphasis supplied)

3. Nor is there validity to Petitioners' Reason "(3)", for Allowance of the Writ, that the deletion of Channel 2 "was taken in face of express Congressional disapproval of the concept of deintermixture." As Judge Washington pointed out in his opinion (*Fort Harrison Telecasting Corp.* v. *Federal Communications Commission*, *supra*, at 384, 385, Pet. App. 11a):

> "The Commission notified Congress that the Springfield case would be one of four proceeded with because it would not involve any dislocation or disruption of existing service in the areas involved. As we pointed out in *WIRL Television Co.* v. *United States*, supra at 344, 253 F.2d. at 866, with respect to deletion of a VHF channel and substitution of two UHF channels at Peoria, Illinois, in similar circumstances, the long range goal of the Commission—which is reflected in the legislation—is to encourage UHF. As Springfield has never made use of VHF Channel 2, it is not arbitrary, as it was not in WIRL, to conclude that the goal will be better approached 'by allotting it four technically equal UHF channels, rather than one superior VHF channel and two inferior UHF channels.'"

4. Nor does the record support Petitioners' Reason "(4)", for Allowance of the Writ, that the prior allocation of Channel 2 on March 1, 1957 to St. Louis formed the "principal basis" for the second order. This contention was fully considered by the Court below which concluded that the earlier allocation of Channel 2 to St. Louis had not been so relied upon by the Commission as to require reversal and reconsideration. On this point, the Court of Appeals said (*Fort Harrison Telecasting Corporation* v. *Federal Communications Commission, supra*, at 386, Pet. App. 14a):

> "Temporary authorizations for station operation granted by the Commission should not be made the basis of preferring the holder of the authorization over other competing applicants for a permanent license. Similarly, where cities are competing for channel allocations, a temporary allocation to one city rather than another should not operate to create vested rights. *But each situation of this sort must be judged on its own merits, and we are satisfied that the Commission's conclusions here are adequately buttressed by the other grounds on which it relied. Under the circumstances, we do not believe we would be justified in setting aside the Commission's action because it relied in part on the line of reasoning here under discussion.*" (emphasis supplied)

This was an eminently reasonable conclusion. For the Commission was explicit that its primary purpose, in deleting VHF Channel 2 from Springfield, was to enhance the opportunities for multiple UHF service in Springfield, and that use of Channel 2 in St. Louis and Terre Haute was a mere "by-product" of this primary objective.[1]

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[1] As noted above at page 6, the Commission stated: "as a by-product of not using Channel 2 in Springfield" (J.A. 321) the channel "may continue to be used in St. Louis" . . . "It may also be used to provide Terre Haute with a second local VHF service . . ." (J.A. 321)

Nor is there basis for inference that the 1962 decision reflected bias because three of the Commissioners had also served at the time of the March 1, 1957 order, for, as the Court of Appeals noted, "the membership of the Commission which rendered the 1962 decision was substantially different from the membership participating in the 1957 decision."[2] Besides, even as to the members holding over, the Court of Appeals had held in its July 27, 1961 decision that:

> "as the United States recognizes, it is unnecessary for the Commsision to reconsider the conclusion expressed in its Report and Recommendation of February 16, 1961, that no Commissioner is disqualified and no party is absolutely disqualified . . ."
>
> (*Sangamon Valley Television Corporation* v. *United States*, 111 U. S. App. D. C. 113, 294 F.2d. 742)

Indeed, no claim of bias was included in the notice of appeal or stipulated issues filed with the Court of Appeals or in this Court, nor is there any factual basis for the vague innuendos in footnotes 16 and 19 of the Petition.[3]

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[2] *Fort Harrison Telecasting Corporation* v. *Federal Communications Commission, supra*, at p. 384.

[3] As noted above, Judge Horace Stern, after a full hearing, found that Signal Hill's ex parte presentations were made "in the honest belief that there was nothing illegal or improper in so doing in a rule making proceeding, a view more or less generally held at the time by members of the industry, by other interested parties, by public officials, and apparently by lawyers as well." (19 Pike & Fischer Radio Regulation 1055 at 1073, Finding of Fact 22.) The Commission adopted the Initial Decision, almost in toto, including the conclusion that no member of the Commission was disqualified to participate in the further proceedings and that the conduct of no party was such as to disqualify it. (19 Pike & Fischer Radio Regulation 1055). The Court of Appeals held that it was unnecessary for the Commission to reconsider this conclusion (*Sangamon Valley Television Corporation* v. *United States*, 111 U.S. App. D. C. 113, 294 F. 2d. 742) and this holding has never been challenged by petitioners.

5. Petitioners' Reason "(5)" for Granting the Writ is that the deintermixture order will leave "the people of the State of Illinois" without a vitally needed wide coverage television station in this "centrally located state capital." But, as pointed out above in answering to Petitioners' Reason "(2)", the Commission's decision to delete the *VHF* channel, was to provide more rather than less service by preserving and fostering multiple UHF service. The Court below aptly disposed of this question (*Fort Harrison Telecasting Corporation* v. *Federal Communications Commission*, *supra*, at 383, 384, Pet. App. 8a):

> "We conclude that so long as the television transmission service allocated to a community, whether it be solely VHF, UHF, or a combination of both, is determined on the basis of relative need, amounts to a fair and equitable distribution of service for that community, in relation to others, and gives efficient service to the community, the standard set out in Section 307(b) is fully met.
>
> "We think that the Commission's action here with respect to Springfield—giving it four UHF channels, one reserved for educational purposes, and no VHF channel—meets this test . . .
>
> "While we entirely sympathize with the desire of the State of Illinois and Sangamon for a VHF channel in Springfield, it is not within our competency or function to say that Springfield's need could be met only by a single VHF channel rather than by two additional UHF channels, in the light of all the circumstances shown."

CONCLUSION

The decision below is correct. It involves resolution of a television allocation problem peculiarly within the competence of the Federal Communications Commission. Decision depends upon the peculiar facts of the community concerned so that no issue of general importance is presented. Nor is there any conflict with decisions of other circuit courts or of this court. The petition for a writ of certiorari should therefor be denied.

Respectfully submitted,

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